

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application 14-04-013
(Filed April 11, 2014)

And Related Matter.

Application 14-06-012
(Filed June 17, 2014)

**REPLY COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES
ON THE PROPOSED DECISION GRANTING WITH CONDITIONS
APPLICATION TO TRANSFER CONTROL
[PUBLIC VERSION]**

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I. DISCUSSION

As Parties' comments repeatedly expressed, the 25 conditions in the Proposed Decision (PD) approving the merger simply do not match the PD's description of the harms to customers which the merger will cause. Nor are the conditions feasible. Contrary to the comments of the Applicants, the record evidence of these consolidated proceedings overwhelmingly supports a denial of this merger.¹

A. APPLICANTS PROPOSE TO CIRCUMVENT PROPER CPUC PROCESSES

The Applicants begin their comments on the PD with the following pronouncement:

as was reflected in their comments at the All Party meeting, and apart from this filing, *Joint Applicants plan to work through the ex parte process with the Commission toward a set of conditions that address concerns identified by the Proposed Decision – including conditions that Comcast would agree to voluntarily.*²

Applicants' proposal to negotiate privately with the commissioners on what conditions it finds acceptable, a process that would occur outside of the evidentiary record and behind closed doors, appears to be an attempt to undermine California Public Utilities Commission (CPUC) processes and procedures, and counters recent efforts taken by the CPUC to prioritize "openness and transparency."³ The Office of Ratepayer Advocates (ORA) encourages the CPUC to issue a decision in these consolidated proceedings that is based on record and a process that is transparent.

B. APPLICANTS' CRITIQUE OF ORA'S COMPETITION ANALYSIS IS FLAWED

Applicants' assertion that the Horizontal Merger Guidelines (HMG) are "clear that relevant markets are geographically bounded when, as here, voice and broadband providers lack facilities to service voice or broadband customers outside of their geographically-limited footprints" is replete with factual and legal errors.⁴ This claim focuses on an outdated view of the market and ignores evidence of Comcast's plans to enter into the market for over-the-top (OTT) services, which includes programming, such as Netflix, Amazon and Comcast, delivered via a customer's broadband connection. Seen from the perspective of consumers and content providers, the appropriate geographic scope of the OTT market under the HMG is statewide, as the PD acknowledges. This is consistent with the Scoping Memo, which determined that the focus of the consolidated proceedings is on evaluating the California-specific effects

¹ Applicants are Comcast Corporation (Comcast), Time Warner Cable, Inc. (TWC), Bright House Networks California and Charter Communications.

² Applicants' Comments at 1-2 (emphasis added).

³ Introductory Remarks of President Picker, January 14, 2015 CPUC meeting at 5.

⁴ Applicants' Comments at 16.

of the merger.⁵ Thus, the Herfindahl-Hirschman Index (HHI) analysis that ORA provided, and the PD adopted, is correctly based on a statewide market because, under the HMG, the relevant geographic market includes any location in California where OTT services can be accessed via a high-speed broadband connection.

This matters here because one of the California-specific effects of the merger will be Comcast's unparalleled dominance in the last-mile control of California consumers, i.e., "eyeballs," and in the content and OTT markets. The PD correctly analyzes the tremendous market power Comcast will have *vis a vis* content providers and consumers, for whom Comcast is the only game in town. The PD's fatal flaw, however, is that none of the 25 conditions adequately address market power.

Applicants claim that it would be cost-prohibitive and unprofitable for it and TWC "to make the major investments necessary to enter each other's markets as an out-of-footprint OVD [online video distributor]." ⁶ In response to this contention, ORA presented evidence regarding the expansion of OTT services in a Supplemental Declaration and Expert Report of Dr. Lee L. Selwyn (Supplemental Declaration) provided as Attachment A.⁷ As the Supplemental Declaration discusses, competitive entry into the OTT services market can now be accomplished without overbuilding, and therefore, the economic barrier to an OTT service provider entering into the incumbent provider's operating area, such as Comcast competing head to head against TWC and vice versa, disappears.⁸

Furthermore, ORA recently found confidential documents that Comcast plans to enter into the OTT services market, which has no geographic boundary.⁹ In a document provided as Attachment B titled [REDACTED], Comcast asks strategic questions such as "[REDACTED]" ¹⁰ Later in the document, in response to this strategic question, Comcast provides that [REDACTED]

⁵ Scoping Memo and Ruling of Assigned Commissioner and ALJ at 12-14.

⁶ Applicants' Comments at 22. "The Joint Applicants' expert, Dr. Mark Israel, expressly premised his support for this theory on the basis that entry by one of the Joint Applicants into the other's operating area would require overbuilding a new network entirely from scratch, and that the costs of such an undertaking would be prohibitively expensive[.]" ⁶ (Attachment A, Supplemental Declaration at 4.)

⁷ Applicants specifically reference the Supplemental Declaration on pages 22-23 of their Comments.

⁸ Attachment A, Supplemental Declaration at 4. ORA's Motion to Late-File the Supplemental Declaration has not been ruled on.

⁹ DISH relied on these same documents in a letter to the FCC it filed on 2/10/14. ORA asked DISH for the Bates numbers for these documents and DISH provided the Bates numbers with Comcast's and TWC's permission on 2/27/2015. Finding these documents without the Bates numbers would have been nearly impossible with the limited searching capability and functionality that Applicants provided ORA, as noted in ORA's letter to Applicants dated 1/29/15. <http://apps.fcc.gov/ecfs/document/view?id=60001028351>

¹⁰ Attachment B, [REDACTED]

Workshop on the merger that “I think everyone here and everyone in the room would agree that the shift toward OVD video is the fundamental transformation of the industry and that any deck would be expected and I think all of the Comcast decks see this as disruptive and the number one challenge to deal with and the number one thing to overcome.”¹⁹

Moreover, Applicants’ contention that entering the OTT market would be cost-prohibitive is simply not true. Comcast already offers OTT-like products, such as TVEverywhere, which allows Comcast’s customers to access content anywhere that a broadband connection is available on any device. That Comcast only offers these products to customers who are also pay TV subscribers is a business decision; it would not require Comcast to do anything more, on an infrastructure-basis, to expand the reach of the program outside of its existing footprint. The bottom line is that OTT is another example of Comcast using its control of telecommunications facilities to leverage ancillary markets.

The Applicants also question the PD’s use of the 25 Mbps definition of broadband from the FCC’s Section 706 Report in evaluating the merger’s effect on competition in California, claiming it is an “aspirational policy.”²⁰ Applicants’ argument runs counter to one of their primary justifications for the merger – that it will bring higher-speeds to consumers.²¹ As Comcast’s own economist recently stated, “[s]o on the 25 megabits, I mean, I don’t deny. I think Comcast agrees that we’re all trying to move towards faster speeds. That’s the motivation for the transaction.”²² Furthermore, the PD’s conclusion that Comcast will have predominant market power in California was based on an analysis of other competitors that offer speeds comparable to Comcast, speeds of 25 Mbps and up. Simply put, no one but Comcast can compete in that market. Google has not deployed any fiber in California and has named only one city in California, San Jose, as a “*Potential Fiber city*.”²³

Applicants’ comments also mischaracterize the FCC’s Section 706 Report.²⁴ For a service to be considered advanced, it must enable Americans “to originate and receive high-quality voice, data, graphics, and video telecommunications.”²⁵ The FCC stated that “the speed benchmark we adopt in this

¹⁹ FCC’s Economic Analysis Workshop, Transcript at 179 (lines 16-22) to 180 (lines 1 -2); <http://apps.fcc.gov/ecfs/document/view?id=60001031131>

²⁰ Applicants’ Comments at 19.

²¹ Applicants’ Brief at 77 (Comcast has doubled its speeds and “the majority of Comcast Internet customers in California now receive speeds of more than 50 Mbps, with a third or so receiving speeds up to 105 Mbps”).

²² FCC’s Economic Analysis Workshop, Transcript at 131, Lines 6-9.

²³ <https://fiber.google.com/newcities/>

²⁴ 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, Adopted January 29, 2015, GN Docket No. 14-126 (citing 47 U.S.C. §§ 1302(b) and (d)(1)).

²⁵ Section 706 Report at 3, ¶ 3 (citation omitted); *see also* Section 706 Report at 16-17, 20 ¶¶ 19-22, 27.

Report is intended to respond to the directives in section 706.”²⁶ Applicants ask the CPUC to consider technologies and speeds that do not fall under the definition of “advanced communications capability,” which is contrary to the law.²⁷

Applicants also claim that “the Commission has no call [sic] to believe that Comcast would degrade its service by blocking or interfering with some edge provider traffic” and that “there are any number of ways to get to Comcast.”²⁸ The only way to reach Comcast’s customers is through Comcast’s pipes. And the record demonstrates that Comcast has engaged in exactly this type of behavior as evidenced by Confidential Exhibit 6 to ORA’s Brief, Comcast Netflix “Master IP Backbone Services Agreement.” The FCC and the D.C. Circuit have also recognized that Comcast has the ability, and in fact has engaged in, the blocking and throttling of Internet traffic.²⁹ Comcast’s actions were the subject of a complaint at the FCC.³⁰ Through three FCC decisions and numerous court challenges, the response to Comcast’s actions resulted in the FCC’s adoption of the Open Internet Order on February 26, 2015.³¹

II. CONCLUSION

The record evidence in these consolidated proceedings overwhelmingly supports a denial of the proposed merger. As the comments on the PD indicate, the 25 conditions do not mitigate the harms of the merger and are infeasible. Applicants’ comments show that they are unwilling to accept even the modest conditions that the PD seeks to impose on it. Applicants’ comments on the PD and its challenges to the CPUC’s jurisdiction are also not legally or factually accurate. There is a strong, legal basis for the CPUC to assert jurisdiction under Section 706. The CPUC is also bound by *NCPA v. CPUC*, which requires the CPUC to consider the anti-competitive effects in any proceeding before it, whether or not the CPUC has explicit regulatory jurisdiction. Thus, the CPUC has ample and clear jurisdiction to review the effects of the proposed merger, and to take any necessary steps, including denying the merger in California, under Public Utilities Code Section 854, Section 706 and *NCPA v. CPUC*.

²⁶ *Id.* at 33, ¶ 54.

²⁷ The FCC adopted slower speeds for the Connect America Fund in order to balance advance services outreach with the limits of universal service funding. (Section 706 Report at 33, ¶¶ 54-55.)

²⁸ Applicants’ Comments at 24-25.

²⁹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Open Internet Order*, 25 F.C.C.R. 17905 (2010).

³⁰ *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008).

³¹ See <http://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet>

Respectfully submitted,

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